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7                   **UNITED STATES DISTRICT COURT**  
8                   **DISTRICT OF NEVADA**  
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10 RICK L. BURTON, an individual and  
11 GULFSTREAM LAND INVESTMENTS,  
12 LLC, a Nevada limited liability company

2:07-CV-00080-BES-LRL

13                   **Plaintiffs,**  
14                   **ORDER**  
15                   **v.**  
16                   **FOCH INVESTMENTS, INC, a California**  
17                   **corporation; DAVID L. THERMION, an**  
18                   **individual; RICHARD K.M. DOHERTY, an**  
19                   **individual; HALPERN REAL ESTATE**  
20                   **DEVELOPMENT, LLC, a New York limited**  
21                   **liability company; JASON HALPERN, an**  
22                   **individual; DOES I through X, ROE**  
23                   **CORPORATIONS XI through XX,**  
24                   **inclusive,**  
25                   **Defendants.**

26                   Presently before the Court is Defendants' Motion to Dismiss (#8), filed on April 19,  
27 2007. Plaintiffs filed their Opposition to Motion to Dismiss (#9) on May 7, 2007. Defendants  
28 filed their Reply in Support of Motion to Dismiss (#10) on May 21, 2007.

1                   **I. BACKGROUND**

2                   This case arises out of an alleged non-circumvention agreement between Plaintiffs  
3 and Defendants. (Compl. (#1) ¶ 1.) According to Plaintiffs, the agreement was meant to  
4 govern the parties' attempts to construct a mixed use development, including a "W" Hotel  
5 and casino in Las Vegas, Nevada. Id. Plaintiffs claim that Defendants breached the  
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1 agreement, attempting to develop the property without Plaintiffs. Id.

2 The pending action was filed on January 19, 2007. Id. Prior to that, however,  
 3 Plaintiffs filed a similar lawsuit in Nevada state court. (Mot. to Dismiss (#8) Ex. 1.) The  
 4 parties ultimately stipulated to a voluntary dismissal of that action. Id. at Ex. 2. Plaintiffs  
 5 contend that they did so because a California forum represented a more convenient  
 6 location for Defendants. (Opp'n (#9) 3.) Thus, after dismissing the Nevada state court  
 7 action, Plaintiffs re-filed their complaint in California state court. Id. at Ex. 3. Following the  
 8 initiation of the California state court action, Defendants informed Plaintiffs that they  
 9 intended to enforce the forum selection clause in the non-circumvention agreement, which  
 10 required Plaintiffs to pursue their suit in Nevada. (Opp'n (#9) Ex. A.) Plaintiffs agreed to  
 11 dismiss the California action on condition that both parties waive all fees and costs incurred  
 12 up to that point in the state court suit. (Opp'n (#9) Ex. A, B.) Plaintiffs then filed their  
 13 complaint in this Court. (Compl. (#1).) Defendants now move to dismiss, citing Nevada  
 14 Rule of Civil Procedure ("NRCP") 41(a)(1) for the proposition that the dismissal of the  
 15 California action was a dismissal on the merits and, therefore, the instant suit is barred by  
 16 the doctrine of res judicata. See (Mot. to Dismiss (#8) 2-3.)

## II. LEGAL STANDARD

18 In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P.  
 19 12(b)(6), the court must accept as true all material allegations in the complaint as well as  
 20 all reasonable inferences that may be drawn from such allegations. LSO, Ltd. v. Stroh,  
 21 205 F.3d 1146, 1150 (9th Cir. 2000). The allegations of the complaint also must be  
 22 construed in the light most favorable to the nonmoving party. Shwarz v. United States, 234  
 23 F.3d 428, 435 (9th Cir. 2000). The purpose of a motion to dismiss under Rule 12(b)(6) is  
 24 to test the legal sufficiency of the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir.  
 25 2001). The court can grant the motion only if it is certain that the plaintiff will not be entitled  
 26 to relief under any set of facts that could be proven under the allegations of the complaint.  
 27 Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 338 (9th Cir. 1996).

28 The court need not, however, accept as true those allegations that (1) contradict

1 matters properly subject to judicial notice; (2) are conclusory allegations of law, mere legal  
 2 conclusions, unwarranted deductions of fact, or unreasonable inferences; (3) are  
 3 contradicted by documents referred to in the complaint; or (4) are internally inconsistent.  
 4 Shwarz v. United States, 234 F.3d at 435; Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir.  
 5 1998); Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994); Branch v.  
 6 Tunnell, 14 F.3d 449, 454 (9th Cir. 1994), rev'd on other grounds by Galbraith v. County of  
 7 Santa Clara, 307 F.3d 1119 (9th Cir. 2002); Western Mining Council v. Watt, 643 F.2d 618,  
 8 624 (9th Cir. 1981); Response Oncology, Inc. v. MetraHealth Ins. Co., 978 F. Supp. 1052,  
 9 1058 (S.D. Fla. 1997). Nor need the court accept as true allegations in an amended  
 10 complaint that, without any explanation, contradict an earlier complaint. Bradley v. Chiron  
 11 Corp., 136 F.3d 1317, 1324 (Fed. Cir. 1998); see also Ellingson v. Burlington N., Inc., 653  
 12 F.2d 1327, 1329-30 (9th Cir. 1981) (court may strike the challenged allegations as "false or  
 13 sham" and dismiss the complaint for failure to state a claim).

### 14 III. ANALYSIS

#### 15 A. Motion to Dismiss

16 NRCP 41(a)(1) states in relevant part:

17 [A]n action may be dismissed by the plaintiff upon repayment of defendants'  
 18 filing fees, without order of court (i) by filing a notice of dismissal at any time  
 19 before service by the adverse party of an answer or of a motion for summary  
 20 judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal  
 21 signed by all parties who have appeared in the action. Unless otherwise  
 22 stated in the notice of dismissal or stipulation, the dismissal is without  
 23 prejudice, except that a notice of dismissal operates as an adjudication upon  
 24 the merits when filed by a plaintiff who has once dismissed in any court of the  
 25 United States or of any state an action based on or including the same claim.  
 26 Nevada's Rule 41(a)(1) mirrors Fed. R. Civ. P. 41(a)(1), which in relevant part reflects the  
 27 so-called "two dismissal" rule, see Lake at Las Vegas Investors Group, Inc. v. Pacific  
Malibu Dev. Corp., 933 F.2d 724, 726-28 (9th Cir. 1991). Under the Federal Rules, the two  
 28 dismissal rule states that any voluntary dismissal made pursuant to Rule 41(a)(1) acts as a  
 29 dismissal without prejudice unless the plaintiff has previously dismissed a similar suit in  
 another federal or state court. Fed. R. Civ. P. 41(a)(1); see also Lake at Las Vegas, 933  
 F.2d at 726-28. The Nevada rule merely states the same proposition with respect to the

1 effect of a voluntary dismissal in a Nevada state court. Cf. Executive Mgmt. Ltd. v. Ticor  
 2 Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (noting that "Federal cases  
 3 interpreting the Federal Rules of Civil Procedure 'are strong persuasive authority, because  
 4 the Nevada Rules of Civil Procedure are based in large part upon their federal  
 5 counterparts."). Thus, under Nevada's Rule 41(a)(1), a voluntary dismissal occurs without  
 6 prejudice unless the same claim or action has been previously dismissed by a state or  
 7 federal court. NRCP 41(a)(1).

8 Defendants cite Nevada's Rule 41(a)(1) in support of their argument that Plaintiffs'  
 9 dismissal of the California action was a dismissal on the merits because Plaintiffs had  
 10 previously dismissed their Nevada state court action. That citation, though, is misplaced.  
 11 Nevada's civil procedure rules work no effect on dismissals that occur in California's state  
 12 courts. Instead, they govern only the procedures in Nevada's district courts. NRCP 1  
 13 advisory committee's note (stating that "[t]he rules govern procedure in Nevada district  
 14 courts . . ."). As a consequence, they can only describe the effect of a dismissal from a  
 15 Nevada state court, not a California court. Moreover, to the extent that Plaintiffs suggest  
 16 that Fed. R. Civ. P. 41(a)(1) also acts as a bar, that contention is also erroneous. Like  
 17 Nevada's rule, Fed. R. Civ. P. 41(a)(1) describes only the effect of a voluntary dismissal in  
 18 a federal court itself, not the effect of dismissals in state courts. See Fed. R. Civ. P.  
 19 41(a)(1); Manning v. South Carolina Dept. of Highway & Public Transp., 914 F.2d 44, 47  
 20 n.5 (4th Cir. 1990) (stating that "[w]hen the second dismissal occurs in state court . . . the  
 21 two dismissal rule applies only if the state has enacted its own version of the two dismissal  
 22 rule.").

23 The only circumstance in which the two dismissal rule would force the conclusion  
 24 that the California dismissal constituted a dismissal on the merits would be if California has  
 25 incorporated the two dismissal rule into its own code of civil procedure. See Manning, 914  
 26 F.2d at 47 n.5. However, Defendants do not claim here that that is the case, see (Motion  
 27 to Dismiss (#8); (Reply (#10)), nor has the Court's own survey of California's civil  
 28 procedure provisions resulted in the discovery of such a rule. Defendants' claim, then, that

1 Plaintiffs' dismissal of the California action was effected with prejudice and, thus, that the  
2 instant action is barred by res judicata is unfounded. Defendants' motion is, therefore,  
3 denied.

4 **B. Request for Sanctions**

5 Included in Plaintiffs' opposition is a request that this Court levy sanctions against  
6 Defendants for submitting a motion for no other purpose than to delay the disposition of  
7 this case. (Opp'n (#9) 8-10.) Under Fed. R. Civ. P. 11(c), the Court has discretion to  
8 impose sanctions on a party that has made representations to the court in order to cause  
9 unnecessary delay. That said, the Court is not persuaded that the sole purpose of the  
10 submission of the motion in question was to delay this action. Therefore, Plaintiffs' request  
11 is denied.

12 **IV. CONCLUSION**

13 Accordingly, IT IS ORDERED that Defendants' Motion to Dismiss (#8) is DENIED.

14 IT IS FURTHER ORDERED that Plaintiffs' Request for Sanctions (#9) is DENIED.

15 DATED: This 3rd day of October, 2007.

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22 UNITED STATES DISTRICT JUDGE  
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